

BellSouth Corporation
Legal Department
Suite 900
1133 21st Street, N.W.
Washington, D.C. 20036-3351

barbee.ponder@bellsouth.com

L. Barbee Ponder IV
Senior Regulatory Counsel-D.C.

202 463 4155
Fax 202 463 4805
Cell 202 215-6364

August 12, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Ex Parte Presentation, WC Docket Nos. 02-33, 98-10, 95-20, 01-337;
CC Docket No. 02-52

Dear Ms. Dortch:

On July 10, 2003, BellSouth filed a letter presentation that detailed the costs that BellSouth presently incurs in complying with the existing disparate regulation of its wireline broadband services.¹ On July 29, 2003, BellSouth filed an ex parte letter presentation establishing the fact that any lack of complete overlap between the footprints of cable modem and DSL-based broadband services is minimal.² AT&T Corp. ("AT&T") and MCI, Inc. ("MCI") have filed ex partes that attempt to challenge certain aspects of these presentations.³ With this letter, BellSouth responds.

INTRODUCTION

Initially, BellSouth notes that neither AT&T nor MCI has ever purchased the tariffed DSL transmission that BellSouth offers pursuant to the existing *Computer Inquiry* regime to provide broadband services.⁴ Thus, a determination by the

¹ Ex Parte Letter from L. Barbee Ponder IV, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (July 10, 2003), as modified by Letter from L. Barbee Ponder IV, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (August 11, 2003) (as modified, "July 10 *ex parte*");

² Letter from L. Barbee Ponder IV, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (July 29, 2003) ("July 29 *ex parte*").

³ See Ex Parte Letter from David L. Lawson, Counsel for AT&T Corp., to Marlene Dortch, Secretary, FCC (August 14, 2003) ("AT&T Aug. 14 *ex parte*"); Ex Parte Letter from Richard S. Whitt, MCI, to Marlene H. Dortch, Secretary, FCC (September 3, 2003) ("MCI Sept. 3 *ex parte*").

⁴ Similarly, EarthLink, one of the largest independent ISPs, does not purchase BellSouth's tariffed DSL transmission offering, opting instead to purchase a more efficient enhanced service. See Ex Parte Letter from L. Barbee Ponder IV, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (April 20, 2004).

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Commission to remove *Computer Inquiry* and Title II regulation from RBOC-provided broadband services would not have any impact on AT&T and MCI's existing efforts to provide broadband services to the public at large.

Rather than rely upon the basic transmission compelled by the *Computer Inquiry* regime, AT&T and MCI have chosen to use their own facilities, as well as enter into line splitting arrangements with Data LECs to offer a bundle of voice and data services to their customer base.⁵ The elimination of *Computer Inquiry* and Title II regulation of BellSouth's broadband services would not affect their continued ability to engage in these line splitting arrangements.

While AT&T and MCI may claim to represent the best interests of independent ISPs that do in fact utilize BellSouth's tariffed DSL transmission, an objective examination of AT&T and MCI's arguments reveal otherwise. Specifically, AT&T's and MCI's sole motivation in opposing the removal of the outdated regulatory constraints that currently affect wireline broadband services is their desire to ensure that the costs incurred by incumbent LECs to provide retail broadband services, as well as wholesale broadband transmission, are as high and as debilitating as possible.

Over two years ago, the Commission commenced the *Wireline Broadband Classification Proceeding* and recognized that "the infrastructure of today may be insufficient to support the applications of tomorrow."⁶ Over the past two years, our Nation has continued to slip further and further behind other industrialized countries that are building out high-speed networks that surpass our own in both speed and efficiency. The continued application of anachronistic regulatory schemes to wireline broadband investments and services is standing in the way of our catching up in the world marketplace and violates the President's recent call to clear away the regulatory underbrush that is stifling wireline investment and innovation. Final and decisive Commission action in this two-year old proceeding is long overdue.

DISCUSSION

1. Contrary to AT&T and MCI's claims, incumbent LECs have every incentive to provide competitive access to independent ISPs.

The Dubious Duopoly: Both AT&T and MCI claim that incumbent LECs retain substantial market power in the provision of wholesale broadband transmission, necessitating a continuation of the regulatory status quo.⁷ In support of its argument that incumbent LECs retain market power, AT&T claims that a

⁵ See Ex Parte Letter from Glenn T. Reynolds, Vice President – Federal Regulatory for BellSouth, to Marlene Dortch, Secretary, FCC, WC Docket 03-251 (May 18, 2004); Ex Parte Letter from Glenn T. Reynolds, Vice President – Federal Regulatory for BellSouth, to Marlene Dortch, Secretary, FCC, WC Docket 03-251 (June 20, 2004)

⁶ *Id* at ¶ 4.

⁷ AT&T Aug. 14 *ex parte* at pp. 1-2; MCI Sept. 3 *ex parte* at p. 4.

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“duopoly” (i.e., cable modem and incumbent LEC DSL providers) exists in the provision of broadband services, which cannot permit regulatory relief for wireline broadband providers. While there may presently exist two main technological platforms for the mass distribution of broadband services (cable modem and DSL), other distribution platforms are becoming more widespread and commercially viable (e.g., fixed wireless and 3G data services, satellite broadband, and broadband over power lines). Furthermore, the reality of the marketplace is that there are numerous providers of broadband services, *including AT&T and MCI*, which use various technological platforms, *but not incumbent LEC wireline broadband facilities*, to provide broadband services to the mass market.⁸

Indeed, AT&T and MCI both fail to mention the fact that they each have their own facilities that could be used to provide broadband services. For instance, in state commission proceedings concerning BellSouth’s DSL provisioning practices, WorldCom admitted that it currently provides DSL-based broadband services over its own facilities to select classes of business customers in thirty-one (31) urban markets across the United States.

Similarly, AT&T’s claims of duopoly are belied by the fact that it presently offers its own DSL service to residential customers. AT&T actively markets “AT&T DSL Service” on its Consumer website, yet AT&T does not utilize the tariffed wholesale DSL transmission that incumbent LECs such as BellSouth are required to offer pursuant to the existing *Computer Inquiry* regime in order to provide its DSL services.

Further, representatives of AT&T recently made presentations to several Commission personnel touting their plans to transform their existing network to an IP-based system so as to be able to offer voice and data services in a seamless and more efficient manner. Indeed, AT&T recognizes the fact that the “data/voice distinction is blurring”.⁹ Of course, AT&T is demanding significant regulatory relief for its plans to build this next generation network, arguing that de-regulatory policies promote capital investment in new technologies such as VoIP.

In addition to actually providing broadband services over their own networks, AT&T and MCI have also entered into line splitting agreements with the largest non-incumbent LEC provider of xDSL services, Covad Communications. Indeed, Covad announced plans to offer ADSL service to “more of AT&T’s 50 million consumer customers” through line splitting.¹⁰ Similarly, on September 2nd, Covad announced that it

⁸ See July 5 *ex parte* at note 43.

⁹ See Ex Parte Letter from Patrick H. Merrick, Esq., AT&T, to Marlene Dortch, Secretary, FCC (September 22, 2003)(“AT&T Sept. 22 *ex parte*”).

¹⁰ See Covad Communications, AT&T and Covad Extend Residential DSL relationship, Press Release (dated Jan. 6, 2003) http://www.covad.com/companyinfo/pressroom/pr_2003/010603_press.shtml (stating that this agreement will enable more of AT&T’s 50 million consumer customers to obtain xDSL

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had entered into a line splitting agreement with MCI to provide high-speed DSL Internet service to MCI's residential and business customers using "Covad's nationwide network, which covers over 1,800 central offices, serving more than 40 million homes and businesses in 96 of the top Metropolitan Statistical Areas (MSAs) in 35 states." As BellSouth has previously established, even *real* independent ISPs such as EarthLink (who provide their own content) utilize Covad's transmission facilities to provide broadband services to their end user customers.¹¹

Covad has continued to expand its DSL footprint within BellSouth's service territory as well as across the nation, while AT&T has continued to expand its relationship with Covad.¹² Covad increased the number of DSL lines served by 24 percent year-over-year as of the first quarter of 2004.¹³ Covad president and chief executive officer Charles Hoffman noted that Covad's new dedicated-loop ADSL offering (also known as "naked DSL" or "dry loop DSL") provides "more connectivity choices to over 50 million household and small businesses within Covad's nationwide network."¹⁴

Further, MCI has partnered with New Edge Networks to "triple" its DSL coverage to deliver DSL services to MCI business customers.¹⁵ In July of 2003, BellSouth conducted a study to determine the number of BellSouth's central offices that MCI's qualification tool (on their public web site) indicated were capable of providing DSL service in Florida. This study determined that MCI had deployed (or reached an agreement with a partner that had deployed) DSL capability to 156 out of 199 of BellSouth's central offices in Florida. More notably, MCI had chosen to deploy DSL capability to the largest of BellSouth's central offices, which serve over 95% of BellSouth's end-user customer access lines in Florida.

Moreover, while only RBOC broadband facilities and services continue to be regulated as a "bottleneck" under the *Computer Inquiry* regime, the FCC's most recent data show that cable continues to dominate the broadband mass market. According to the Commission's latest *High-Speed Services Report*, as of year-end 2003, cable controlled approximately *two-thirds* of all high-speed lines provided to residential and small-

service through Covad's network, which itself covers more than 40 million households and businesses nationwide).

¹¹ See June 5 *ex parte* at pp. 14, citing EarthLink's 10K/A filing (EarthLink's "largest provider of broadband connectivity is Covad.").

¹² See Letter from Gregg Hyde, Covad Communications Company, to Marlene Dortch, Secretary, FCC, Docket Nos. 04-36, 04-29, 01-338, 96-98 and 98-147, at 3 (June 4, 2004).

¹³ Covad News Release, *Covad Communications Group Announces First Quarter 2004 Results; Revenue Increases 19%* (May 17, 2004).

¹⁴ Covad Press Release, *Covad Launches Dedicated-Loop ADSL for Consumers and Small Businesses Nationwide* (July 6, 2004).

¹⁵ Ex Parte Letter from Glenn T. Reynolds, Vice President – Federal Regulatory for BellSouth, to Marlene Dortch, Secretary, FCC, WC Docket No. 03-251 (June 15, 2004)

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business customers,¹⁶ which is the segment of the broadband market that cable operators target.¹⁷ As of that same date, cable also controlled more than 84 percent of the most rapidly growing segment of mass-market broadband lines – those capable of over 200 kbps in both directions.¹⁸

The Commission has already recognized that, in addition to cable and DSL, there are numerous additional platforms and technologies already competing in or poised to enter the broadband mass market, including power lines, fixed wireless, 3G mobile wireless, and satellite.¹⁹ Indeed, many of these technologies are already being used to provide service offerings that are competitive with DSL and cable modem services, both for residential and small-business customers. Under well-settled precedent, all of these alternatives must be taken into account in the analysis of broadband competition,²⁰ particularly the fact given that the broadband market is still “in the earliest stages” and is evolving rapidly.²¹

¹⁶ Ind. Anal. & Tech. Div., Wireline Competition Bureau, FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003* at Tables 3 & 4 (June 2004) (“*High-Speed Services Report*”).

¹⁷ Compare *High-Speed Services Report* at Table 3 (Cable provides 16,416,364 high-speed lines to residential and small-business customers) with *High-Speed Services Report* at Table 1 (Cable provides a total of 16,446,322 high-speed lines).

¹⁸ See *High-Speed Services Report* at Table 4. Residential and small-business high-speed lines capable of over 200 kbps in both directions represented 89 percent of all residential and small-business high-speed lines added in 2003, and 92 percent of all high-speed lines added during that same period. See *id.* at Tables 1, 3 & 4.

¹⁹ See, e.g., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Third Report, 17 FCC Rcd 2844, ¶¶ 79-88 (2002); *Triennial Review Order* ¶ 263 (“[T]he Commission also has acknowledged the important broadband potential of other platforms and technologies, such as third generation wireless, satellite, and power lines.”) (citing *Third Section 706 Report 2002*, 17 FCC Rcd 2844, ¶¶ 79-88 (2002)); R. Mark, *Broadband over Power Lines: FCC Plugs In*, Internetnews.com (Apr. 23, 2003), <http://dc.internet.com/news/article.php/2195621> (Chairman Powell: “[t]he development of multiple broadband-capable platforms – be it power lines, Wi-Fi, satellite, laser or licensed wireless – will transform the competitive broadband landscape.”).

²⁰ The Commission has held that a proper market analysis must “examine not just the markets as they exist today,” but must also take account of “future market conditions,” including “technological and market changes, and the nature, complexity, and speed of change of, as well as trends within, the communications industry.” *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control of NYNEX Corp. and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶¶ 3, 7, 41 (1997) (“*Bell Atlantic/NYNEX Merger Order*”); *Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent To Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations To Provide International Facilities-Based and Resold Communications Services*, Memorandum Opinion and Order, 13 FCC Rcd 15236, ¶ 19 n.65 (1998); *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp., Transferor, and AT&T Corp. to AT&T Comcast Corp., Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23246, ¶ 27 (2002); see also *Triennial Review Order* ¶ 263 (“The fact that broadband service is actually available through another network platform and may potentially be available through additional platforms helps alleviate any concern that competition in the broadband market may be heavily dependent upon unbundled access.”); *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97 (1953); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981).

²¹ *Bell Atlantic/NYNEX Merger Order* ¶¶ 40-41; see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Third Report, 17 FCC Rcd 2844, ¶¶ 79-88 (2002) (“preconditions for monopoly appear absent” in the broadband market).

The Commission should see through AT&T's attempts to mischaracterize the broadband marketplace as being dominated by a "duopoly" of providers. At best, the only duopoly that might exist is in the choice of technological platforms, not broadband service providers. Even regarding available platforms, however, additional options such as fixed wireless, and broadband over power lines are being developed and deployed with ever-greater speed.

In a recent speech to the Commerce Department, the President highlighted these emerging technologies that he hopes will propel the Nation forward towards his 2007 broadband objective:

We need to get broadband to more Americans and so, therefore, I want to talk about two other ways to get broadband to the consumer. We need to use our power lines better.... [O]ne great opportunity is to spread broadband throughout America via power lines.... [I] was shown a little thing you plug in your wall that will give you broadband access at ...sixty times the current speed of dial-up. And that's now available in Cincinnati and parts of Kentucky.

The other promising new broadband technology is wireless. The spectrum that allows for wireless technology is a limited resource.... If we want to achieve the goal of broadband in every corner of the country by 2007, and shortly thereafter, people will have more options and more choice, we need to make more spectrum available.²²

As highlighted in the President's speech, numerous innovative technological platforms for the delivery of broadband services are fast becoming a reality. These new platforms, along with the Nation's existing ubiquitous cable-modem infrastructure, can provide broadband services that are independent of the incumbent wireline network. The Commission must recognize that its core assumption justifying the need for the *Computer Inquiry* regime – the Bell Operating Companies' wireline networks are necessary for the delivery of information (or "enhanced") services to the public – is no longer valid. In short, there is no "bottleneck" that would justify continuation of the *Computer Inquiry* regime.

The Overlap Flap: AT&T also claims that even a duopoly does not exist in many areas, and points to the fact that some DSL-based broadband customers do not have a cable-modem alternative as support for continuing the existing regulatory regime.²³ AT&T does not offer any independent data to support its claim; rather, AT&T is reduced to flagrantly misrepresenting the analysis provided by BellSouth in its July 29 *ex parte*, claiming that "BellSouth now concedes that there may be as many as 20 million

²² <http://www.whitehouse.gov/news/releases/2004/06/20040624-7.html>

²³ Interestingly, neither AT&T nor MCI address the fact that any such analysis would also lead to the conclusion that many cable-modem broadband customers have no DSL-based alternative.

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households in the United States that have access to Bell-provided DSL service, but have no cable alternative.”²⁴ The most cursory review of the July 29 *ex parte* will confirm that BellSouth made no such concession. AT&T’s claimed 20 million households with no cable alternative would only result if the most extreme assumptions regarding DSL and cable modem deployment were true, *i.e.*, that every household in America was presently able to receive broadband service such that the overlap between cable and DSL facilities was minimized to the greatest extent possible. Of course, as BellSouth stated, these extreme assumptions regarding the broadband marketplace are simply not true.

Further, AT&T attempts to attack the methodology that BellSouth employed in order to determine the actual extent to which cable-modem and BellSouth DSL services overlap within its region. BellSouth’s analysis revealed that, at most, only 6% of end user customers utilizing BellSouth DSL services are served by central offices that do not presently have a cable-modem alternative. This study was not conducted in the manner suggested by AT&T.²⁵ Rather, the study was done by taking a random sample of between 12 and 16 end-user addresses from each of the 1600 central offices (over 19,000 end-user addresses were sampled) in BellSouth’s territory, and testing them on publicly available websites that qualify addresses for cable modem service. Even though BellSouth does not serve all lines and end-user addresses located behind each central office (including many that are served exclusively by cable), this study was conducted to determine the broad availability and overlap of Cable Modem service in areas that BellSouth also provided DSL service.

There is No Broadband Competition in the Business Market? AT&T also claims that cable-modem service is not generally available to business customers.²⁶ Once again, AT&T attempts to confuse the issue by discussing the two main technological platforms for providing broadband services, rather than addressing the fact that there are numerous broadband service providers utilizing one or both of those platforms to serve business customers. BellSouth has previously provided information to the Commission concerning the extent of competition in the small business broadband market, revealing that cable companies hold a significant share of that market.²⁷ As one considers other broadband market segments for larger business customers, both the complexity of the broadband services demanded, as well as the number of competitive providers of those services, increases.²⁸ Indeed, while cable companies predominately use their traditional cable-modem platform to provide broadband services to small business customers, there are numerous other facilities-based CLECs and data service providers that provide

²⁴ AT&T’s Aug. 14 *ex parte* at p. 2.

²⁵ AT&T Aug. 14 *ex parte* at pp. 10-11.

²⁶ *Id.*

²⁷ See Ex Parte Letter from Glenn T. Reynolds, Vice President – Federal Regulatory for BellSouth, to Marlene Dortch, Secretary, FCC (May 1, 2003) (establishing that BellSouth serves no more than 31% of the entry level high-speed Internet access market for small business customers within its region, while cable companies serve approximately 26% of that market).

²⁸ *Id.* at p. 6 (“Larger customers have a broad variety of other options for internet access (*i.e.*, T-1, integrated access, dedicated internet access, ISDN and frame relay) and providers.”).

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broadband services to medium and large size business customers using other fiber-based and/or packet-switched technologies.²⁹

ILECs Have no Market Power in Broadband. Try as they may, AT&T and MCI fail to put forth any rational basis to support their claim that incumbent LECs possess power in some ill-defined market for wholesale broadband transmission or that removal of *Computer Inquiry* and Title II regulation of wireline broadband services will cause independent ISPs to exit the market. Both fail to acknowledge or otherwise address the financial reality of the marketplace that BellSouth has previously established in this proceeding – “it is not in the financial best interest of BellSouth or any other company to simply refuse to provide a competitive DSL transmission service to independent ISPs, given the fact that such ISPs can and would simply strike a deal with some other transmission provider and migrate their customer base to those competing facilities.”³⁰

These marketplace realities are further confirmed by Verizon’s September 3 *ex parte* that establishes the following:

ILECs cannot be considered “monopolists” in the provision of broadband transport services to independent ISPs and that competition from other retail providers of broadband Internet services would prevent ILECs from exercising market power by raising the price of wholesale DSL transport services following the elimination of common carrier regulation faced by ILECs.”³¹

Given the numerous broadband choices available to end users, BellSouth will suffer financially if any independent ISP utilizing BellSouth’s broadband network simply goes out of business or decides to move its embedded customer base to alternative network facilities.

2. *MCI reveals its true motivation by demanding that the disparate assessment of USF contributions on broadband services continue.*

Incredibly, MCI claims that the Commission should do nothing to address the gross disparity in the present imposition of Universal Service Fund obligations on wireline broadband services, but not on cable modem broadband services. Indeed, MCI claims that BellSouth’s only point in making this argument was to “artificially inflate” its estimate of the cost of regulation.³² Contrary to these claims, there is absolutely nothing

²⁹ BellSouth has previously provided to the Commission a Cox Communications presentation showing how its network architecture serves business customers of all sizes and locations. See Ex Parte Letter from L. Barbee Ponder IV, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (June 20, 2003).

³⁰ Ex Parte Letter from Jonathan B. Banks, Counsel for BellSouth, to Marlene Dortch, Secretary, FCC (July 5, 2003) (“July 5 *ex parte*”); see also BellSouth Comments at 17.

³¹ Ex Parte Letter from W. Scott Randolph, Verizon Communications, to Marlene H. Dortch, Secretary, FCC (Sept. 3, 2003), attaching Supplemental Declaration of Dennis W. Carlton and Hal S. Sider.

³² See MCI Sept. 3 *ex parte* at p. 13.

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artificial about the disadvantage suffered by wireline broadband providers that are required to pay such contributions, while the dominant providers of broadband services do not.

MCI's claims confirm its true motivation in this proceeding – ensuring that incumbent LEC costs of provisioning broadband services remain as high and debilitating as possible. The Commission should find that BOCs are not required to collect and pay universal service fund support on wireline broadband services unless and until the Commission imposes a similar obligation on all broadband providers across all technological platforms.

3. *AT&T's objections to BellSouth's cost analysis reveal AT&T's lack of understanding concerning the Computer Inquiry obligations.*

AT&T raises several objections to BellSouth's analysis concerning the costs incurred to comply with the present regulatory disparity. In its July 10 *ex parte*, BellSouth identified \$78.94 per customer per year (or \$6.58 per customer per month) of costs incurred to comply with regulatory burdens that are not imposed on the dominant provider of broadband services, cable. These costs included \$42.93 of annual cost per customer caused specifically by the *Computer Inquiry* regulatory regime and \$36 of annual cost per customer caused by the disparate assessment of Universal Service Fund contributions. In its July 10 *ex parte*, BellSouth made clear that these were not all of the disparate costs caused by the present regulatory regime, but only those costs that could be specifically attributable to the present regulatory regime. There are other substantial costs caused by these regulations that BellSouth discussed in its *ex parte*, but did not quantify as part of these estimates.

AT&T begins its attack by making the bald assertion that the "lion's share of the costs the Bells identify are not even caused by the *Computer Inquiries* rules, but would be incurred by any carrier seeking to offer wholesale broadband transport to ISPs."³³ AT&T does not identify the specific costs to which it is referring. BellSouth assumes that AT&T is referring to the Universal Service Fund contributions portion, or that AT&T is making the arguments similar to those made by EarthLink which BellSouth has previously addressed.³⁴

For example, AT&T points to the fact that BellSouth has spent a considerable fortune to develop broadband customer support processes which any company would be

³³ AT&T Aug. 14 *ex parte* at p. 2.

³⁴ See Ex Parte Letter from Mark J. O'Connor, Counsel for EarthLink, Inc. to Marlene Dortch, Secretary, FCC (May 12, 2003); July 10 *ex parte* at p. 11 ("While BellSouth may continue to incur costs associated with these categories of expense [overhead and administration; repair, maintenance and consumer service; OSS; equipment infrastructure, network and technical support costs] even if the *Computer Inquiry* obligations are removed, the fact is that the existing regulations dramatically *increase* the amount of such costs in these categories.").

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required to do in order to offer wholesale broadband transmission to independent ISPs.³⁵ However, the costs that BellSouth identifies are due to the fact that BellSouth's attempts to develop improved, more efficient processes have been greatly frustrated by the *Computer Inquiry* regulations that require BellSouth to create OSS that provide demonstrably nondiscriminatory access for all ISPs.

This nondiscriminatory access obligation requires BellSouth to build systems and capabilities so that all ISPs, regardless of size, business interest, or customer demographics have access to all of the same features, capabilities and functionalities. For example, even though all ISPs have access to aggregated traffic interfaces (required to be tariffed as the underlying transport product necessary to support the RBAN enhanced service offering), only 3% of all ISPs have taken advantage of this type of interface in the 18 months that it has been offered. This is despite numerous attempts (via promotions) by BellSouth to encourage adoption of this more efficient interface. BellSouth expended millions of dollars to develop this aggregated handoff and the supporting ordering, provisioning, maintenance and billing systems in a non-discriminatory manner, yet only a handful of its largest ISPs have chosen to avail themselves of this latest service offering.

Additionally, BellSouth maintains a completely artificial and wholly inefficient separation between its regulated and non-regulated technical support operations so as to meet the nondiscrimination requirements of the *Computer Inquiry's* Comparably Efficient Interconnection ("CEI") and Open Network Architecture ("ONA") regulations. BellSouth would continue to provide technical support operations such as help desk functions if the regulations were removed, but it would do so in a dramatically more efficient manner by combining the separate operations groups that are presently maintained, and tailor the support functions to meet the needs of specific customer groups. For example, BellSouth would be able to develop a specific service level for ISPs that focus predominantly on business customers. By eliminating the *Computer Inquiry* regime, BellSouth could actually better serve its smaller, business focused, ISP community.

AT&T's claims that such separations are a "contrivance" because the Commission removed any structural separation requirements demonstrate its fundamental misunderstanding of the nondiscrimination requirements mandated by the *Computer Inquiry* regime.³⁶ Computer III relieved companies such as BellSouth from having to provide enhanced/information services through separate affiliates, but nevertheless required such companies to provide the underlying transmission component of any enhanced service on a completely nondiscriminatory basis. For instance, in order to ensure that all ISPs (including its own ISP) have equal access to network repair personnel, BellSouth is forced to separate the groups and systems that provide customer support for the regulated network from the groups and systems that provide customer support for the non-regulated network. Physical separation of groups ensures that

³⁵ AT&T Aug. 14 *ex parte* at p. 3.

³⁶ *Id.* at 5.

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informal communications do not happen, even if they improve the support processes for all ISPs. Additionally, even though modern systems can keep proprietary customer information of one ISP from being accessed by another ISP, the need for nondiscriminatory access to the portion of the systems supporting the underlying regulated component of the service often requires that two systems be created. The physical separation of groups, and the logical separation of systems, allows BellSouth to clearly identify the line of demarcation between regulated and non-regulated services, even if that line serves no other purpose.

The Two-Mile Rule. AT&T claims that the two-mile rule should be maintained, arguing that it was put in place to “curb demonstrated market power abuses by the Bells.”³⁷ If so, then the Commission should recognize the fact that incumbent LECs do not exercise market power in broadband services for all of the numerous reasons demonstrated in this proceeding and eliminate this requirement. For these same reasons, AT&T’s claim that the two-mile rule remains necessary due to ILEC control of “bottleneck facilities that are essential to providing broadband services” should also be dismissed. As established above, AT&T provides its own DSL services to its own customers without relying upon the wholesale broadband transmission that ILECs are required to provide pursuant to the *Computer Inquiry* regime. Moreover, cable-modem facilities continue to dominate the broadband market while numerous other technological platforms are in development for the further competitive delivery of broadband services. There is no bottleneck; consequently, under AT&T’s own analysis, there is no further need for the two-mile rule.

Finally, AT&T claims that BellSouth could avoid the extra \$2310 per month per circuit caused by the two-mile rule by allowing unaffiliated ESPs to collocate and self-provide transport.³⁸ It is no solution to the present regulatory disparity to replace one onerous set of regulations with yet another. No other provider of broadband services, including cable or DSL providers such as Covad, are similarly burdened with such requirements. The only demonstrable effect of the FCC’s continued application of the two-mile rule is to artificially increase the cost that BellSouth incurs to provide broadband services to its retail customers.

Customized/Redundant Equipment. AT&T claims that BellSouth is unable to point to an example where it could not obtain the equipment or vendor support that it needs to meet its regulatory obligations. AT&T misses the point entirely. BellSouth has not argued that it is technically impossible to purchase, install and maintain equipment that will permit it to meet its regulatory obligations. Rather, BellSouth has maintained that the cost of creating a network architecture that is in compliance with such obligations is much more expensive than the more efficient, converged network that BellSouth would otherwise deploy.

³⁷ *Id.* at p. 4.

³⁸ AT&T Aug. 14 *ex parte* at p. 4.

Indeed, this network would apparently look remarkably similar to the IP-based network that AT&T recently informed the Commission that it wishes to deploy. BellSouth has previously explained why the cost of continued compliance with the existing *Computer Inquiry* regime is increasing due to the convergence of voice and data networks: “the whole notion of separating basic from enhanced services that underlies the *Computer Inquiry* rules is no longer tenable with today’s increasingly converged broadband networks.”³⁹ AT&T recognizes this same network evolution in its September 22 *ex parte*: “Protocol conversion is happening directly in many CPE devices, not just “computers ... It is quickly becoming difficult to discern what a ‘phone call’ is in the traditional sense.”⁴⁰ Continued application of the *Computer Inquiry* regime to BOC facilities denies companies such as BellSouth the efficiencies and cost savings that would otherwise result from the technological migration to packet switched, IP-based, networks.

Inefficient Transport to ISPs. In its July 10 *ex parte*, BellSouth explained that it would be more efficient to perform protocol conversion earlier in the customer’s data flow, yet the existing *Computer Inquiry* non-discrimination requirements make the most efficient choices impracticable.⁴¹ AT&T responds by saying that BellSouth can perform protocol conversion at any point in its network, so long as it unbundles and makes available the underlying transport on a nondiscriminatory basis.⁴² In so doing, AT&T simply restates the ultimate problem that BellSouth has identified with the existing regulatory regime. The existing regime causes BellSouth to perform protocol conversion at less than optimal points within its network, which produces no corresponding benefit to anyone.

Inability to Make Customized Deals. AT&T attempts to diminish the significance of the impact of the *Computer Inquiries* unbundling requirement on the BOCs’ ability to make customized deals with ISPs. AT&T contends that the BOCs have ample opportunities to make customized deals and cites contract tariff doctrine as an example. As an initial matter, the BOCs do not have contract tariff authority throughout their serving areas. Instead, contract tariffs are a form of pricing flexibility that the Commission’s rules afford local exchange carriers (LECs) on an MSA by MSA basis if they can meet certain market tests.

On its face, it would appear that the Commission has provided some flexibility for LECs’ to design customized arrangements. Indeed, the AT&T *ex parte* is written as if the LECs already have the authority to use contract tariffs ubiquitously.⁴³ The fact of the

³⁹ July 10 *ex parte* at p. 3.

⁴⁰ AT&T Sept. 22 *ex parte* at p. 3.

⁴¹ July 10 *ex parte* at p. 6.

⁴² AT&T Sept. 22 *ex parte* at p. 7.

⁴³ AT&T, citing the AOL Bulk Service Order, contends that the BOCs have already used the flexibility to enter into arrangements with Internet Service Providers. In the first instance, the issue resolved in the AOL Bulk Service Order was whether LEC DSL services provided to ISPs were retail or wholesale services. The Commission concluded that such services were not retail services. Next, in making that determination the Commission observed that ISPs purchase LEC DSL and then package such DSL with their Internet offerings. The Commission referenced a volume discount tariff that Verizon had on file for DSL. The

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matter is they do not. Moreover, the tests in the Commission's rules that must be satisfied to obtain the authority to offer contract tariffs relate to service elements, *e.g.*, channel terminations, interoffice facilities and entrance facilities for all dedicated transport services, not specific services. Thus, even though BellSouth is non-dominant in the provision of broadband services, it cannot obtain ubiquitous contract tariff authority unless it can meet these tests for all dedicated transport services.

Even if contract tariff authority were universally granted for broadband services, the tariff requirement would still act as a significant constraint on the BOCs ability to design and offer the customized arrangements the market place demands. Customers already have the ability to enter into contracts with other broadband providers without having to have the terms and conditions of that contract publicly disclosed. To do business with the BOC, the customer must be willing to forgo such confidentiality. In so doing, the customer must be willing to provide his competitors with important information regarding his cost structure and the elements of his enterprise. Accordingly, imposing a tariff requirement, even though it is a contract tariff, diminishes the competitiveness of the BOC vis à vis its broadband competitors where no such requirement exists.

Furthermore, there is no reason for any kind of tariff requirement. While the Commission has required the filing of contract tariffs for dominant carriers to act as a regulatory check, it likewise has removed such requirements where the competitive market place affords ample protection against discriminatory behavior. Simply put, where the customer has competitive alternatives, the customer will just move to the alternative from whom it can get the best deal. Certainly, that is the case in the broadband market. The BOCs do not have market power and are non-dominant in the provision of broadband services. The BOCs will simply lose the business if they are not competitive. In these circumstances, there is no reason for the Commission to continue a rule whose only effect is to stifle the BOCs ability to compete.

CONCLUSION

Having never actually utilized any of the claimed benefits generated by the Computer Inquiry regime in order to provide broadband services to their customers, the Commission should give no weight to AT&T and MCI's insistence that this underbrush

tariff to which the Commission referred hardly could be characterized as a customized arrangement, as AT&T suggests. To the contrary, it was a generally available, off-the-shelf tariff.

Ms. Marlene H. Dortch

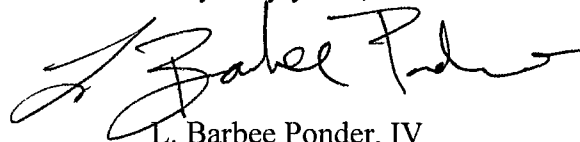
August 12, 2004

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be maintained. For all of these additional reasons, BellSouth urgently requests that the Commission take final action in these proceedings and end *Computer Inquiry* and Title II regulation of wireline broadband services.

Very truly yours,

A handwritten signature in black ink, appearing to read "L. Barbee Ponder, IV". The signature is fluid and cursive, with a large initial "L" and a long, sweeping underline.

L. Barbee Ponder, IV

LBPIV:kjw